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**DEPARTMENT OF AGRICULTURE**

**Animal and Plant Health Inspection Service**

**7 CFR Part 301**

**[Docket No. APHIS-2018-0041]**

**RIN 0579-AE48**

**Amendments to the Pale Cyst Nematode Regulations**

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to amend the domestic quarantine regulations for pale cyst nematode by adding procedures that would allow persons to review and comment on the protocols for regulating and deregulating quarantine and associated areas. As part of this proposal, we are making the protocols publicly available. We are proposing these actions in response to a court order requiring the Animal and Plant Health Inspection Service to facilitate public input into the development of protocols for deregulating fields for pale cyst nematode. The changes we propose would make the protocols more accessible and give persons the opportunity to comment on their development.

**DATES:** We will consider all comments that we receive on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may submit comments by either of the following methods:

- Federal eRulemaking Portal: Go to

<http://www.regulations.gov/#!docketDetail;D=APHIS-2018-0041>.

- Postal Mail/Commercial Delivery: Send your comment to Docket No. APHIS-2018-0041, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2018-0041> or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799-7039 before coming.

**FOR FURTHER INFORMATION CONTACT:** Ms. Evelia Sosa, Assistant Director, Pest Management, PHP, PPQ, APHIS, 4700 River Road Unit 137, Riverdale, MD 20737; (301) 851-2217; [Evelia.Sosa@aphis.usda.gov](mailto:Evelia.Sosa@aphis.usda.gov).

**SUPPLEMENTARY INFORMATION:**

Background

The pale cyst nematode (PCN, *Globodera pallida*) is a major pest of potato crops in cool-temperature areas. Other hosts of this pest include tomatoes, eggplants, peppers, tomatillos, and some weeds. The PCN is thought to have originated in Peru and is now widely distributed in many potato-growing regions of the world. Females commonly form cysts containing 200 to 600 eggs, which can remain dormant and viable in soil for up to 30 years. Affected potato plants may exhibit yellowing, wilting, or death of foliage. Unmanaged infestations can cause potato yield losses ranging from 20 to 70 percent. The spread of PCN in the United States could result in a significant loss of domestic and foreign markets for U.S. potatoes and other host commodities.

Section 414 of the Plant Protection Act (PPA, 7 U.S.C. 7714) provides that the Secretary of Agriculture may, under certain conditions, hold, seize, quarantine, treat, apply other remedial measures to destroy or otherwise dispose of any plant, plant pest, plant product, article, or means of conveyance that is moving, or has moved into or through the United States or interstate if the Secretary has reason to believe the article is a plant pest or is infested with a plant pest at the time of movement.

The PCN regulations in 7 CFR part 301 (Subpart—Pale Cyst Nematode, §§ 301.86 through 301.86-9, referred to below as the regulations) set out quarantine and movement restrictions for regulated articles from fields infested with PCN and associated fields.

Section 301.86-3 sets out procedures for determining the areas quarantined for PCN. Paragraph (a) of § 301.86-3 states that, in accordance with the criteria listed in § 301.86-3(c), the Administrator of the Animal and Plant Health Inspection Service (APHIS) will designate as a quarantined area each field that has been found to be infested with PCN, each field that has been found to be associated with an infested field, and any area that the Administrator considers necessary to quarantine because of its inseparability for quarantine enforcement purposes from infested or associated fields.

Under § 301.86-3(c), APHIS designates a field as being infested if PCN is found in that field. A field is designated as an associated field, meaning that the field is at risk for PCN, if it meets certain criteria. These include any field in which PCN host crops were grown in the last 10 years, *and* 1) The field shares a border with an infested field; or 2) the field came into contact with a regulated article listed in § 301.86-2 from an infested field within the last 10 years; or 3) within the last 10 years, the field shared ownership, tenancy, seed, drainage or runoff, farm

machinery, or other shared cultural practices with an infested field that could allow spread of PCN.

Paragraph (d) of § 301.86-3 states that an infested field will be removed from quarantine when a protocol approved by the Administrator as sufficient to support removal of infested fields from quarantine has been completed and the field has been found to be free from PCN based on the protocol. The removal from quarantine of any associated fields also requires steps under an approved protocol.

The PCN regulations were first established in an interim rule published September 12, 2007 (72 FR 51975-51988, Docket No. APHIS-2006-0143), after parts of Bingham and Bonneville Counties, ID, were quarantined upon discovery of PCN in several potato fields in 2006. The interim rule restricted the interstate movement of potatoes and other regulated articles from the quarantined area to prevent the spread of PCN to non-infested areas of the United States. We included in § 301.86-3 of the interim rule the provision that an infested field will be removed from quarantine when a 3-year biosurvey protocol approved by APHIS has been completed and the field has been found to be free of PCN. The 3-year biosurvey protocol involves planting PCN host crops in soil from a field and sampling the soil for PCN. This process must be repeated over three crop cycles with negative results in order for APHIS to deregulate a field for PCN.

On April 29, 2009 (74 FR 19374-19382, Docket No. APHIS-2006-0143), we published a final rule based on our evaluation of public comments that we received on the interim rule and input from an independent science panel. Based on our review of this information, we determined that including the 3-year biosurvey protocol in the regulations as the only approach for deregulating fields precluded the potential use of other methods that would be sufficient for

evaluating fields for PCN, so we broadened the approach in § 301.86-3(d)(1) to read “a protocol approved by the Administrator as sufficient to support removal of infested fields from quarantine.” We stated in the final rule that we would continue to solicit stakeholder input as we develop the field removal protocol and update affected producers and other interested parties on our progress.

On April 28, 2015, a group of Idaho potato farmers subject to the PCN quarantine filed a complaint against APHIS in the U.S. District Court in Idaho. Among the allegations in the complaint was that APHIS violated provisions of the PPA and the Administrative Procedure Act (APA) by not developing accessible regulations and failing to follow notice and comment requirements of the APA. The plaintiffs alleged that the final rule contemplated further rulemaking through the creation of protocols to be used to support removal of infested and associated fields from regulation. Because APHIS had not publically issued the protocol referenced in the final rule, the plaintiffs stated they were unclear as to what methods and data APHIS drew on in deciding whether to deregulate infested and associated fields, making the requirements imposed on the plaintiffs vague and impossible to satisfy. The complaint asked the court to set aside the final rule and end the quarantine and regulation of all fields owned and farmed by the plaintiffs.

In a decision filed March, 20, 2018,<sup>1</sup> the court declined to set aside the final rule, citing the economic value of the potato industry and noting that ending regulation for PCN would have adverse consequences on the State of Idaho and the United States. However, the court ruled that APHIS did not satisfy the requirements of the APA because the deregulation protocols “change existing law by adding new substantive requirements for the quarantining and deregulating of

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<sup>1</sup> [https://www.gpo.gov/fdsys/pkg/USCOURTS-idd-1\\_15-cv-00143/pdf/USCOURTS-idd-1\\_15-cv-00143-2.pdf](https://www.gpo.gov/fdsys/pkg/USCOURTS-idd-1_15-cv-00143/pdf/USCOURTS-idd-1_15-cv-00143-2.pdf)

PCN infested and associated fields to be implemented by APHIS pursuant to its authority under the PPA.” Accordingly, the protocols were determined to be legislative rules for which APHIS is required to provide a notice of availability of the protocols in the *Federal Register*, provide a period for interested individuals to comment on the protocols, and publish the adopted protocols not less than 30 days before the effective date. The court ordered APHIS to immediately begin the process of providing for public notice and comment on the protocols and to satisfy the APA notice and comment requirements for all current and future actions relating to regulation of PCN.

We are responding to the court order in this rulemaking by proposing to include procedures in the regulations for public notice and comment of the PCN deregulation protocols. Although not ordered to do so by the court, we are proposing to do the same for the criteria APHIS uses to make initial designations of fields. We are proposing to amend § 301.86-3, paragraphs (c) and (d), to provide that any substantive changes to the protocols will first be announced in a *Federal Register* notice that informs the public of the proposed change and solicits comment. After we review and consider public comments on the changes, we would publish another notice in the *Federal Register* informing the public of any changes we made to the protocols.

The protocols are available for comment on the Regulations.gov website and in our reading room (see ADDRESSES above for instructions for accessing Regulations.gov and information on the location and hours of the reading room). We would make future versions of protocols available on the APHIS website or upon request from any local office of APHIS-Plant Protection and Quarantine; local offices are listed in telephone directories.

## Executive Orders 12866 and 13771 and Regulatory Flexibility Act

This proposed rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget. This proposed rule is not expected to be an Executive Order 13771 regulatory action because this proposed rule is not significant under Executive Order 12866.

In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities. The analysis is summarized below. Copies of the full analysis are available by contacting the person listed under FOR FURTHER INFORMATION CONTACT or on the Regulations.gov website (see ADDRESSES above for instructions for accessing Regulations.gov).

According to the Small Business Administration, entities whose main activity is potato farming (classified under NAICS 111211) are considered small if they have \$750,000 or less in annual receipts. Based on the 2012 Census of Agriculture, there were about 24,000 farms in Idaho, of which around 800 were considered to be primarily potato farms. Bingham and Bonneville Counties had 122 and 36 potato farms, respectively. There were about 2,000 farms in Idaho with farm sales greater than \$500,000, of which around 1,200 farms had farm sales greater than \$1 million. According to the 2012 Census, 142 of Bingham County's 1,265 farm operations (about 11 percent) had farm sales greater than \$500,000, while in Bonneville County, 56 of the 893 farm operations (about 6 percent) had farm sales greater than \$500,000. Although the distribution of potato farms with farm sales above \$500,000 (or \$750,000) is not known, it is reasonable to conclude that many of the potato farms in Bingham and Bonneville counties are under the threshold and would be considered as small business entities.

However, the proposed rule would not impose new or additional burdens on small entities as this is an administrative action for which there would be no additional costs.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

#### Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 2 CFR chapter IV.)

#### Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this proposed rule is adopted: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

#### Paperwork Reduction Act

This proposed rule contains no reporting, recordkeeping, or third party disclosure requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

#### List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

Accordingly, we propose to amend 7 CFR part 301 as follows:



## **Subpart S—Pale Cyst Nematode**

1. The authority citation for part 301 continues to read as follows:

Authority: 7 U.S.C. 7701-7772 and 7781-7786; 7 CFR 2.22, 2.80, and 371.3.

Section 301.75-15 issued under Sec. 204, Title II, Public Law 106-113, 113 Stat. 1501A-293; sections 301.75-15 and 301.75-16 issued under Sec. 203, Title II, Public Law 106-224, 114 Stat. 400 (7 U.S.C. 1421 note).

2. Section 301.86-3 is amended as follows:

- a. In paragraph (a), by removing the words

“[http://www.aphis.usda.gov/plant\\_health/plant\\_pest\\_info/potato/pcn.shtml](http://www.aphis.usda.gov/plant_health/plant_pest_info/potato/pcn.shtml)” and adding the words “<https://www.aphis.usda.gov/planthealth/pcn>” in their place; and

- b. By revising paragraphs (c)(1) and (d).

The revisions read as follows:

### **§ 301.86-3 Quarantined areas.**

\* \* \* \* \*

(c) \* \* \*

(1) *Infested fields.* A field will be designated as an infested field for pale cyst nematode upon a determination that viable pale cyst nematode is present in the field. The determination will be made in accordance with the criteria established by the Administrator for the designation of infested fields. The criteria are presented in a protocol document that may be viewed at <https://www.aphis.usda.gov/planthealth/pcn>. The protocol may also be obtained by request from any local office of Plant Protection and Quarantine; local offices are listed in telephone directories. Any substantive changes we propose to make to the protocol will be published for

comment in the *Federal Register*. After we review the comments received, we will publish another notice in the *Federal Register* informing the public of any changes to the protocol.

\* \* \* \* \*

(d) *Removal of fields from quarantine—(1) Infested fields.* An infested field will be removed from quarantine for pale cyst nematode upon a determination that no viable pale cyst nematode is detected in the field. The determination will be made in accordance with criteria established by the Administrator and sufficient to support removal of infested fields from quarantine. The criteria are presented in a protocol document as provided in (d)(4) of this section along with information for viewing the protocol.

(2) *Associated fields.* An associated field will be removed from quarantine for pale cyst nematode once surveys are completed and pale cyst nematode is not detected in the field. The determination will be made in accordance with criteria established by the Administrator and sufficient to support removal of associated fields from quarantine. The criteria are presented in a protocol document as provided in (d)(4) of this section along with information for viewing the protocol.

(3) *Removal of other areas from quarantine.* If the Administrator has quarantined any area other than infested or associated fields because of its inseparability for quarantine enforcement purposes from infested or associated fields, as provided in paragraph (a) of this section, that area will be removed from quarantine when the relevant infested or associated fields are removed from quarantine.

(4) *Protocol for removal of fields from quarantine.* The Administrator will remove infested and associated fields, and other areas as provided in this section, from quarantine for pale cyst nematode in accordance with the protocols published on the Plant Protection and

Quarantine website at <https://www.aphis.usda.gov/planthealth/pcn>. The protocols may also be obtained by request from any local office of Plant Protection and Quarantine; local offices are listed in telephone directories. Any substantive changes we propose to make to the protocols will be published for comment in the *Federal Register*. After we review the comments received, we will publish another notice in the *Federal Register* informing the public of any changes to the protocols.

Done in Washington, DC, this 25th day of February 2019.

**Kevin Shea,**

*Administrator,*

*Animal and Plant Health Inspection Service.*

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